ECLI:EU:C:2023:683

Provisional text

JUDGMENT OF THE COURT (First Chamber)

21 September 2023(*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Dublin System – Regulation (EU) No 604/2013 – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Responsibility of the Member State which issued a residence document to the applicant – Article 2(l) – Meaning of 'residence document' – Diplomatic card issued by a Member State – Vienna Convention on Diplomatic Relations)

In Case C-568/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 25 August 2021, received at the Court on 16 September 2021, in the proceedings

Staatssecretaris van Justitie en Veiligheid

v

E.,

S.,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb, T. von Danwitz, A. Kumin (Rapporteur) and I. Ziemele, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– E. and S., by F. Wijngaarden, advocaat,

– the Netherlands Government, by M.K. Bulterman and A. Hanje, acting as Agents,

– the Austrian Government, by J. Schmoll and V. Strasser, acting as Agents,

– the European Commission, represented initially by L. Grønfeldt and W. Wils, then by W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 March 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(l) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; 'the Dublin III Regulation').

2 The request has been made in proceedings between the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') and E. and S., acting in their own name and on behalf of their minor children, concerning the rejection of their applications for international protection.

Legal context

International law

3 Under Article 2 of the Vienna Convention on Diplomatic Relations, concluded in Vienna on 18 April 1961 and entered into force on 24 April 1964 (*United Nations Treaty Series*, Vol. 500, p. 95; 'the Vienna Convention'):

'The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.'

4 Article 4 of that convention sets out:

'1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.'

5 Article 5(1) of that convention is worded as follows:

‘The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.’

6 Article 9 of that convention provides:

‘(1) The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

(2) If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognise the person concerned as a member of the mission.’

7 Article 10(1) of the Vienna Convention is worded as follows:

‘The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:

(a) The appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;

(b) The arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;

…’

European Union law

8 Under recitals 4 and 5 of the Dublin III Regulation:

‘(4) The Tampere conclusions also stated that the [Common European Asylum System] should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.’

9 Article 2 of that regulation, entitled ‘Definitions’, provides:

‘For the purposes of this Regulation:

…

(c) “applicant” means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

…

(l) “residence document” means any authorisation issued by the authorities of a Member State authorising a third-country national or a stateless person to stay on its territory, including the documents substantiating the authorisation to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the Member State responsible as established in this Regulation or during the examination of an application for international protection or an application for a residence permit;

…’

10 Articles 7 to 15 of that regulation are in Chapter III thereof, entitled ‘Criteria for determining the Member State responsible’. Article 7 of that regulation, entitled ‘Hierarchy of criteria’, provides, in paragraph 1:

‘The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.’

11 Article 12 of the Dublin III Regulation, entitled ‘Issue of residence documents or visas’, provides in paragraph 1:

‘Where the applicant is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection.’

12 Article 21 of that regulation, entitled ‘Submitting a take charge request’, provides, in the first subparagraph of paragraph 1:

‘Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.’

13 Article 29 of that regulation, entitled ‘Modalities and time limits’, provides in the first subparagraph of paragraph 1:

‘The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).’

The dispute in the main proceedings and the question referred for a preliminary ruling

14 E. and S. and their minor children are third-country nationals. The father was a member of the diplomatic mission of his country to Member State X and lived in the territory of the latter with his wife and their children. During that stay they were issued with diplomatic cards by the Ministry of Foreign Affairs of that Member State.

15 After leaving Member State X, E. and S. lodged applications for international protection in the Netherlands.

16 On 31 July 2019, the State Secretary took the view that Member State X was, under Article 12(1) of the Dublin III Regulation, responsible for examining those applications since the diplomatic cards issued by the authorities of that Member State constituted residence documents. On 25 September 2019, Member State X accepted the take charge requests.

17 By decisions of 29 January 2020, the State Secretary refused to examine the applications for international protection lodged by E. and S. on the ground that Member State X was responsible for examining them.

18 E. and S. lodged appeals against those decisions before the rechtbank Den Haag (District Court, The Hague, Netherlands). In support of those appeals, they claimed that Member State X was not responsible for examining their applications because the authorities of that Member State had never issued them with a residence document. It was on the basis of their diplomatic status that they enjoyed a right to stay, that right being derived directly from the Vienna Convention.

19 By judgment of 20 March 2020, the rechtbank Den Haag (District Court, The Hague) upheld the actions, holding that the State Secretary had erred in holding Member State X responsible for examining the applications for international protection. That court pointed out that diplomatic cards issued by the authorities of that Member State could not be regarded as authorisation to stay because E. and S. already had a right to stay in that Member State under the Vienna Convention.

20 The State Secretary lodged an appeal against that judgment with the Raad van State (Council of State, Netherlands), the referring court, by claiming that the diplomatic cards issued to E. and to S. by Member State X fall within the concept of ‘residence document’ within the meaning of Article 2(l) of the Dublin III Regulation.

21 The Raad van State (Council of State) states that it is not disputed that the authorities of Member State X issued diplomatic cards to E. and to S., and that those cards were still valid at the time when they lodged their applications for international protection in the Netherlands. In addition, Member State X issued those diplomatic cards in accordance with the Vienna Convention, the Kingdom of the Netherlands and Member State X being parties to that convention.

22 According to that court, in order to determine the Member State responsible for examining the applications for international protection lodged by E. and S., it is necessary to answer the question whether a diplomatic card issued by a Member State under the Vienna Convention constitutes a residence document within the meaning of Article 2(l) of the Dublin III Regulation.

23 The answer to that question cannot be inferred directly from that provision, or from the system established by that regulation, or from the relevant rules of public international law. Furthermore, the case-law of the Court concerning that regulation does not provide further clarification in that regard and it appears that the practices of the Member States diverge on that point.

24 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 2(l) of the [Dublin III Regulation] be interpreted as meaning that a diplomatic card issued by a Member State under the [Vienna Convention] is a residence document within the meaning of that provision?’

Admissibility of the request for a preliminary ruling

25 The Austrian Government questions the admissibility of the present request for a preliminary ruling on the ground that the interpretation of the Dublin III Regulation sought is devoid of any purpose to resolve the dispute in the main proceedings. In the present case, the Kingdom of the Netherlands became responsible for examining the applications for international protection at issue since, although Member State X accepted the requests to take charge of the defendants in the main proceedings, the transfer of the applicants to that latter Member State would not have taken place within the six-month time limit laid down in Article 29(1) of that regulation.

26 In that regard, it must be borne in mind, according to settled case-law of the Court, that it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine, with regard to the particular aspects of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 12 January 2023, *DOBELES HES*, C-702/20 et C-17/21, EU:C:2023:1, paragraph 46 and the case-law cited).

27 Accordingly, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 12 January 2023, *DOBELES HES*, C-702/20 et C-17/21, EU:C:2023:1, paragraph 47 and the case-law cited).

28 It should also be recalled that, according to the first subparagraph of Article 29(1) of the Dublin III Regulation, the transfer of the applicant from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3) of that regulation.

29 In the present case, it is apparent from the order for reference that, when he brought an appeal against the judgment at first instance before the referring court, the State Secretary, in view of the forthcoming expiry of the time limit for transfer, applied for the grant of interim measures and that that application was granted.

30 In those circumstances, it appears that the appeal brought by the State Secretary was granted suspensive effect within the meaning of the first subparagraph of Article 29(1) of the Dublin III Regulation, with the result that the six-month time limit referred to in that provision does not begin to run until the referring court has delivered its final decision on that appeal.

31 Consequently, it is not obvious that the interpretation of EU law sought by the referring court is unnecessary in order for it to resolve the dispute before it. The reference for a preliminary ruling is therefore admissible.

Consideration of the question referred

32 In order to answer the question referred, it should be recalled, as a preliminary point, that the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context and the objectives and purpose pursued by the act of which it forms part (judgment of 22 June 2023, *Pankki S*, C-579/21, EU:C:2023:501, paragraph 38 and the case-law cited).

33 As regards the wording of Article 2(l) of the Dublin III Regulation, the concept of 'residence document' is defined as 'any authorisation issued by the authorities of a Member State authorising a third-country national or a stateless person to stay on its territory'. Furthermore, according to that provision, although that concept includes 'the documents substantiating the authorisation to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply', it excludes, by contrast, 'visas and residence authorisations issued during the period required to determine the Member State responsible as established in this Regulation or during the examination of an application for international protection or an application for a residence permit'.

34 The defendants in the main proceedings and the Austrian Government infer, in essence, from the words used by the EU legislature that the concept of 'residence document' covers only acts formally adopted by a national authority and which, by definition, allow a third-country national or a stateless person to remain on the territory of the Member State concerned. In contrast, although diplomatic cards, such as those at issue in the main proceedings, constitute documents formally issued by a national authority, in principle they merely reflect the rights and the privileges enjoyed by their holders under the Vienna Convention. They are therefore purely declaratory in nature and cannot be covered by the concept of 'residence document' within the meaning of Article 2(l) of the Dublin III Regulation.

35 In that regard, it should be noted that, as follows from the use of the words 'any authorisation' in Article 2(l) of the Dublin III Regulation, the concept of 'residence document', within the meaning of that provision, has a broad meaning. In particular, as the Advocate General observed, in essence, in point 46 of his Opinion, the definition of that concept given by that provision does not refer to the constitutive or declaratory nature of the authorisation, nor does it expressly exclude the diplomatic cards issued under the Vienna Convention.

36 As regards the context of which that provision forms part, it should be noted that the concept of a 'residence document' is decisive for the application of Article 12 of the Dublin III Regulation, paragraph 1 of which provides that, where the applicant is in possession of a valid residence document, the Member State which issued it is to be responsible for examining the application for international protection.

37 Article 12 forms part of Chapter III of the Dublin III Regulation, concerning the criteria for determining the Member State responsible. In that regard, it is apparent from the case-law that the application of the various criteria laid down in Articles 12 to 14 of that regulation should, as a general rule, enable the responsibility for examining an application for international protection that may be lodged by a third-country national to be allocated to the Member State which that national first entered or stayed in upon entering on the territory of the Member States, taking into account

the role played by that Member State when the national entered the territory of the Member States (see, to that effect, judgment of 26 July 2017, *Jafari*, C-646/16, EU:C:2017:586, paragraphs 87 and 91).

38 In the present case, the defendants in the main proceedings claim that the role played by Member State X in their presence on the territory of the Member States is negligible since, in accordance with the Vienna Convention, a receiving State is not free, apart from certain special cases, to refuse to allow members of a diplomatic mission appointed by the sending State to enter and stay on its territory.

39 In that regard, while it is true that, under Article 2 of the Vienna Convention, the sending of permanent diplomatic missions is effected by mutual consent, the receiving State is nonetheless granted certain prerogatives as regards the admission to its territory of persons as members of the diplomatic staff of a mission.

40 In particular, Article 9(1) of the Vienna Convention provides that the receiving State may at any time and without having to explain its decision notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable, and a person able to be declared *non grata* or not acceptable even before arriving in the territory of the receiving State. Article 9 adds, in paragraph 2, that if the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1, the receiving State may refuse to recognise the person concerned as a member of the mission.

41 In addition, it is apparent from Article 4(1) and (2) of the Vienna Convention that the sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State, the receiving State not being obliged to give reasons to the sending State for a refusal of *agrément*.

42 Furthermore, under Article 5(1) of the Vienna Convention, if the sending State, upon notification to the receiving States concerned, authorises a Head of Mission or assigns a diplomatic staff member, as the case may be, to more than one State, one of the receiving States may expressly object to this.

43 Finally, Article 10(1) of the Vienna Convention provides, inter alia, that the appointment of the members of the mission, their arrival and their final departure or the termination of their functions with the mission and the arrival and final departure of a person belonging to the family of a member of the mission are to be notified to the competent ministry of the receiving State.

44 In those circumstances, the issue of a diplomatic card to a person by a Member State reflects the latter’s acceptance of that person’s stay on its territory as a member of the diplomatic staff of a mission, and thus demonstrates the role played by that Member State in the presence of that person on the territory of the Member States.

45 The interpretation of the concept of ‘residence document’ as covering a diplomatic card issued under the Vienna Convention also corresponds to the general scheme of the criteria set out in Articles 12 to 14 of the Dublin III Regulation, since, under Article 7(1) of that regulation, that Article 12 is to apply as a matter of priority.

46 As regards the objective pursued by the Dublin III Regulation, recitals 4 and 5 thereof emphasise the importance of a clear and workable method for determining the Member State

responsible, based on objective and fair criteria both for the Member States and for the persons concerned and enabling that that Member State be determined rapidly.

47 Taking into consideration, for the purposes of determining the Member State responsible for examining an application for international protection, the issue of a diplomatic card contributes to the objective of processing such an application expeditiously.

48 Furthermore, as the Advocate General observed, in essence, in point 50 of his Opinion, the purpose of the Dublin III Regulation, recalled in paragraph 46 above, would be undermined if third-country nationals enjoying the privileges and immunities under the Vienna Convention could choose the Member State in which to lodge an application for international protection.

49 In any event, the fact that a diplomatic card is categorised as a ‘residence document’ within the meaning of Article 2(l) of the Dublin III Regulation concerns only the determination of the Member State responsible for examining an application for international protection and has no bearing on the diplomatic right to stay. Furthermore, such a categorisation is without prejudice to a subsequent decision on whether or not to grant international protection by that Member State.

50 Finally, as the Advocate General observed in point 51 of his Opinion, the reference made by the defendants in the main proceedings to the exclusion of persons with a legal status governed by the Vienna Convention from the scope of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44) is irrelevant.

51 First, the Dublin III Regulation provides neither such an exclusion from its scope nor contains any derogating rules concerning the effects to be attached to the issue of a diplomatic card for the purposes of determining the Member State responsible for examining an application for international protection.

52 Second, although Directive 2003/109 does not concern persons who do not intend to settle on a long-term basis in the territory of the Member States, that fact does not prevent them from issuing them residence documents, within the meaning of Article 2(l) of the Dublin III Regulation.

53 In the light of all the foregoing considerations, the answer to the question referred is that Article 2(l) of the Dublin III Regulation must be interpreted as meaning that a diplomatic card issued by a Member State under the Vienna Convention is a ‘residence document’ within the meaning of that provision.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 2(l) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

must be interpreted as meaning that a diplomatic card issued under the Vienna Convention on Diplomatic Relations, concluded in Vienna on 18 April 1961, and entered into force on 24 April 1964, is a 'residence document' within the meaning of that provision.

[Signatures]

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* Language of the case: Dutch.